

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
December 15, 2015

v

DEMETROUS TUSHAI MAGWOOD,  
Defendant-Appellant.

No. 323033  
Wayne Circuit Court  
LC No. 11-001441-FC

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Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for the shooting of Marcus Smith.<sup>1</sup> On appeal, defendant challenges the trial court's decision to score Prior Record Variable (PRV) 7. Defendant further contends that his convictions were against the great weight of the evidence, and that the trial court erred in admitting Smith's identification of him following a photographic lineup and in failing to read a missing witness instruction to the jury. We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting defendant's presentence investigation report (PSIR) to reflect the appropriate score for PRV 7.

I. BACKGROUND

This case arises from the shooting of Marcus Smith. As Smith walked down a residential street in Detroit with Gerard Hardy, a black Cadillac approached and swerved in an attempt to hit the pedestrians. Smith and Hardy moved onto the sidewalk and the Cadillac drove away. The vehicle circled the block and again approached the pedestrians from behind. The driver then parked the Cadillac and four men emerged, all holding handguns. The occupants of the vehicle unleashed a barrage of bullets and Smith and Hardy ran for cover. However, one bullet struck Smith in the chest. Smith was able to identify defendant as one of the four shooters by his street name and general description. He then identified defendant in a photographic lineup.

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<sup>1</sup> The jury also convicted defendant of two lesser offenses that were offered in the alternative, but the circuit court vacated those erroneously entered judgments.

Unfortunately, neither Smith nor Hardy could identify the other three men. Defendant presented several witnesses who testified that he was otherwise occupied at the time of the shooting. The jury rejected that defense.

## II. PRV 7

At sentencing, the trial court acknowledged that the jury had improperly convicted defendant of two offenses that were placed before them as alternative, lesser included offenses of the assault with intent to murder charge. After vacating those convictions, the court inexplicably relied upon them to assess 20 points for PRV 7 (subsequent or concurrent felony convictions). Defendant contends that this score was assessed in error and the prosecution agrees.

The scoring of PRV 7 is governed by MCL 777.57, which provides, in relevant part:

(1) [PRV] 7 is subsequent or concurrent felony convictions. Score [PRV] 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) The offender has 2 or more subsequent or concurrent convictions.....20 points
- (b) The offender has 1 subsequent or concurrent conviction.....10 points
- (c) The offender has no subsequent or concurrent convictions .....0 points

(2) All of the following apply to scoring record variable 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

(b) Do not score a felony[-]firearm conviction in this variable.

A 20-point score can only be assessed when a defendant has two or more subsequent or concurrent convictions, not including a conviction for felony-firearm. As the trial court vacated the jury's two improperly entered convictions, defendant's 20-point score for PRV 7 cannot stand. See *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006) (recognizing a criminal defendant's right to be sentenced on the basis of accurate information, which includes properly scored guidelines).

Defendant asserts that he is entitled to resentencing because the elimination of this score results in a reduction in the recommended minimum sentencing guidelines range. A defendant whose sentence is calculated based on inaccurate information is entitled to resentencing, even if the defendant's minimum sentence would also fall within the amended guidelines range. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010); *People v Johnson*, 474 Mich 96, 98, 103; 712 NW2d 703 (2006); *Francisco*, 474 Mich at 89 n 7. If the scoring correction does not alter the minimum sentencing guidelines range, however, the defendant is not entitled to resentencing. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

As aptly noted by the prosecution, the lower court should have scored 10 points for PRV 7, rendering its scoring error harmless. Following his trial and before sentencing, defendant was released on bond and required to wear a GPS-monitored tether. Defendant unlawfully removed his tether and absconded for three years. When he was recaptured, the prosecution charged defendant with absconding or forfeiting bond in violation of MCL 750.199a. He pleaded guilty and was sentenced for that offense shortly after his sentencing in the current matter. If this matter were remanded for resentencing at this time, the court would be required to impose a 10-point score for PRV 7, reflecting one subsequent felony conviction. Defendant's placement within the sentencing grid does not change with this correction. Therefore, despite the trial court's original error, we decline to vacate and remand for resentencing. But we do remand for the ministerial correction of defendant's PSIR to reflect a score of 10 points, rather than 20, for PRV 7. See *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009).

### III. SUPPRESSION OF PHOTOGRAPHIC LINEUP

In a supplemental brief, defendant contends that the trial court erred in failing to suppress evidence derived from a photographic lineup conducted after he was taken into custody and was available for a corporeal lineup. Although we agree that this evidence should have been excluded, we discern no prejudice demanding relief.

We review for clear error a trial court's decision on a motion to suppress, and underlying legal issues de novo. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). Due to a distrust of photographic lineup procedures, it is generally improper to use a photographic lineup to identify a defendant who is already in custody. *People v Kurylczyk*, 443 Mich 289, 297-298; 505 NW2d 528 (1993). Police officers may resort to a photographic lineup only if a "legitimate reason" exists. *Id.* at 298. Legitimate reasons may include the impossibility of arranging a corporeal lineup, a lack of available people matching the defendant's physical characteristics, and the defendant's refusal to participate or other attempts to "destroy the value of the identification." *People v Anderson*, 389 Mich 155, 186 n 23, 187; 205 NW2d 461 (1973), vacated in part on other grounds by *People v Hickman*, 470 Mich 602 (2004). Generally speaking, if a witness identifies a defendant through an improper pretrial identification procedure, the prosecution must establish an independent basis for any later in-court identification by that witness. See *People v Kachar*, 400 Mich 78, 92-94; 252 NW2d 807 (1977).

Here, investigating officers showed Smith two separate photographic lineups including pictures of defendant. Once Smith was taken to the hospital for treatment, he told the officer that "Tushai" had shot him and gave the officer a general description of his assailant. The officer was familiar with defendant and included his picture in a photographic lineup shown to Smith in the hospital. Smith identified defendant without hesitation. Defendant was arrested shortly thereafter. One month later at a pretrial hearing, defense counsel requested that a corporeal lineup be conducted and that both defendant and his brother be included in the venire, to rule out mistaken identity. It is unclear whether the trial court ordered a corporeal lineup. In any event, despite that defendant was still in custody and available for a corporeal lineup, the investigating officer compiled another photographic lineup, this time including a picture of defendant's brother. Smith had counsel at the lineup, but defense counsel was not present. Smith again

identified defendant as his shooter. Defendant later filed a motion to suppress the second identification, but the trial court rejected his claim.

The trial court clearly erred in denying defendant's motion to suppress. As defendant was in custody, the investigating officer was required, absent a legitimate reason, to arrange a corporeal lineup. *Kurylczyk*, 443 Mich at 297-298. The prosecution never proffered a legitimate reason to conduct a second photographic lineup instead. Moreover, a criminal defendant has the constitutional right to the presence of counsel at any lineup conducted when he is in custody. *Id.* at 298. Yet, it appears that defense counsel was not notified before the second lineup occurred, depriving defendant of that right.

However, “[a] constitutional error is harmless if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *People v Dendel (On Second Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010) (quotation marks and citation omitted). On appeal, defendant does not challenge the validity of the first lineup at which Smith identified defendant without difficulty. Smith was acquainted with defendant before the shooting and was able to describe him to officers by street name and appearance. And the officers were already acquainted with defendant. Evidence from the second photographic lineup was cumulative and unnecessary to resolving the issue of identification. It is therefore clear beyond a reasonable doubt that the jury would have found defendant guilty even absent the error, negating the need for relief.

#### IV. JURY INSTRUCTIONS

Defendant contends that the trial court should have read the missing witness instruction, M Crim JI 5.12, and a full identification instruction, M Crim JI 7.8, to the jury.<sup>2</sup> We review de novo claims of instructional error, *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011), but review for an abuse of discretion the trial court's determination whether a requested instruction was applicable to the facts of the case, *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). More specifically, we review “a trial court's determination of due diligence and the appropriateness of a ‘missing witness’ instruction for an abuse of discretion.” *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

##### A. MISSING WITNESS INSTRUCTION

The prosecution listed Detroit Police Officer Anthony Gaines as a witness on its witness list. Gaines was the first responder at the scene and drove Smith to the hospital. The prosecution did not present Gaines as a witness at trial and defendant objected to his absence. Gaines's presence was important, defendant argued, because Smith did not mention defendant's identity as his shooter to Gaines, giving Smith time to fabricate a tale against him.

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<sup>2</sup> Defendant also cursorily argues that the court should have provided an aiding and abetting instruction. As defendant failed to support that claim with any legal or factual argument, we decline to review it.

“A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial.” *Eccles*, 260 Mich App at 388. A court may excuse the prosecutor’s duty to produce an endorsed witness, if the prosecutor shows that “the witness could not be produced despite the exercise of due diligence.” *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). “[D]ue diligence is the attempt to do everything reasonable, not everything possible” to obtain the witness’s presence. *Eccles*, 260 Mich App at 391. “The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If the court determines that the prosecution failed to exercise due diligence, it may instruct the jurors that they “may infer that [the] witness’s testimony would have been unfavorable to the prosecution’s case.” M Crim JI 5.12; *Eccles*, 260 Mich App at 388. We will not reverse a defendant’s convictions where the court failed to provide this jury instruction “unless it appears that it is more probable than not that the error was outcome determinative.” *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

The trial court did not abuse its discretion in denying defense counsel’s request for the missing witness instruction. The judge could have more closely questioned the prosecutor in determining whether she exercised due diligence in procuring Officer Gaines’s presence at trial. However, all other officers identified on the witness list were in attendance. The prosecutor indicated that she only learned on the first day of trial that Officer Gaines had retired three days earlier. The prosecutor lacked notice that her efforts, which were clearly of sufficient to secure the presence of the other officers, would be insufficient to secure Officer Gaines’s attendance.

Moreover, the prosecutor was willing to stipulate to the admission of Officer Gaines’s police report, but defense counsel demurred. And nothing on the record supports that Officer Gaines’s testimony would have actually assisted defendant’s case. Furthermore, defendant has not established that the failure to read the missing witness instruction was outcome determinative. Several witnesses provided an alibi for defendant, but the jurors chose not to credit the testimony. That a missing witness instruction would have tilted the jurors’ opinions in defendant’s favor is nothing more than conjecture.

## B. IDENTITY INSTRUCTION

Defendant also challenges the trial court’s decision to read a purportedly truncated version of M Crim JI 7.8 to the jury. The jury is read when identification is at issue in a case, and provides:

- (1) One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.
- (2) In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender

before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at that time.

(3) Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.

[(4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his / her) identification of the defendant during trial.]

(5) You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The instruction's use notes state that the court should read the instruction "upon request, in every case in which identity is in issue[,]” but should only read the bracketed portion in § 4 “upon request, when supported by the evidence.” *Id.*

The trial court did not abuse its discretion by failing to read the bracketed portion of the instruction. There is no record indication that defense counsel requested the reading of that portion of the instruction. Rather, defense counsel waited to object until after the jury had already begun deliberating. Moreover, the evidence did not support reading § 4. Smith never gave an identification or description of defendant “that did not agree with his identification of the defendant during trial.” M Crim JI 7.8(4). Although Smith did not identify his shooter to Officer Gaines or a friend present immediately after the shooting, this is not equivalent to *failing* to identify him for purposes of the instruction. In short, defendant was not entitled to the reading of § 4 because Smith consistently identified defendant as his shooter at every stage of the proceedings.

## V. GREAT WEIGHT OF THE EVIDENCE

Finally, defendant contends that his conviction for assault with intent to commit murder was against the great weight of the evidence because there was no physical evidence implicating him, Smith was the only one who identified him, there was no evidence of defendant's intent to kill, and there was a complete lack of credible evidence.

Defendant failed to preserve his challenge by moving for a new trial in the lower court. *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). When reviewing a defendant's challenge based on the great weight of the evidence, conflicting testimony—even if impeached to some extent—and questions regarding witness credibility are insufficient grounds for relief, as resolution of such issues is the sole province of the jury. *People v Lemmon*, 456 Mich 625, 642-643, 647; 576 NW2d 129 (1998).

Defendant's conviction for assault with intent to commit murder was not against the great weight of the evidence. To convict a defendant of assault with intent to commit murder, the prosecution must prove "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014) (quotation marks and citation omitted). Additionally, "identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Defendant does not dispute that Smith was assaulted or that the assault would have been murder had Smith died. Instead, defendant argues that the jury's conclusions that he committed the assault and that he actually intended to kill Smith were against the great weight of the evidence.

The evidence sufficed to establish defendant's identity as the shooter. Smith testified that he saw defendant in the Cadillac when the car drove by, and that he saw defendant get out of the car with a gun. Smith further indicated that he saw the muzzle flash from the gun held by defendant during the shooting. Smith had a previous acquaintance with defendant, identifying him by his street name to investigating officers, and selected defendant's photograph out of a lineup. At the preliminary examination, Smith indicated that he had never seen defendant before the shooting, but he admitted at trial that this was a lie. The jury was free to choose which statement to believe. *Lemmon*, 456 Mich at 642-643, 647. And the jury was free to believe Smith's testimony over the numerous alibi witnesses presented by defendant. *Id.*

Regarding defendant's actual intent to kill, this Court has held that the trier of fact may infer a defendant's intent from the use of a dangerous weapon. *People v DeLisle*, 202 Mich 658, 672; 509 NW2d 885 (1993). Smith testified that defendant shot at he and Hardy with a handgun. Smith was shot in the chest, a location consistent with an intent to kill the victim. Even if not one of defendant's bullets actually struck Smith, the court instructed the jurors that they could convict defendant on an aiding and abetting theory. Consequently, defendant fails to establish that his conviction for assault with intent to commit murder was against the great weight of the evidence or constituted plain error affecting his substantial rights.

We affirm defendant's convictions and sentences, but remand for the ministerial correction of defendant's PSIR. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Mark J. Cavanagh  
/s/ Elizabeth L. Gleicher